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Docket No. 83-1689

In the Supreme Court of the United States

OCTOBER TERM 1983

KAY J. BROWN, Administratrix of the
Estate of Edward Carol Brown, deceased,
KAY J. BROWN, Individually,
RONNIE EDWARD BROWN, an infant by his
Guardian ad litem, Wiley G. Gary, and
TIMOTHY EARL HOGGARD,
Petitioners,

v.

PATRICIA ANN BROWN
and
ALLIED TOWING CORPORATION,
Respondents.

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT
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OCTOBER TERM 1983

KAY J. BROWN, Administratrix of the Estate of Edward Carol Brown, deceased, KAY J. BROWN, Individually, RONNIE EDWARD BROWN, an infant by his Guardian ad litem, Wiley G. Gary, and TIMOTHY EARL HOGGARD,

Petitioners

v.

PATRICIA ANN BROWN

and

ALLIED TOWING CORPORATION,

Respondents

PETITIONERS' REPLY BRIEF

I.

CORRECTION OF ERRONEOUS FACTUAL STATEMENTS

Respondent in her brief made the following erroneous statements to which

petitioners point out the references in the record which disclose the error therein.

A. At page 5 of Respondent's Brief she makes the totally false assertion "that there was no indication whatever in the Motion for Judgment, nor at any time thereafter in the State proceedings, that the Administratrix's action was brought pursuant to the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, et seq. (LHWCA)." She then states that the first time the LHWCA was mentioned by the Administratrix was in her Petition for Rehearing in the Virginia Supreme Court.

Paragraphs 7 and 8 (App F3-F4) of the Administratrix's Motion for Judgment deal specifically with Allied's unsuccessful summary judgment attempt to

bar her claim under the 1972 Amendments to the LHWCA. Appended to her Motion for Judgment as Exhibit "B" was the U.S. District Court Order and Opinion dated August 2, 1976, which appears herein as Complaint of Allied Towing Corp., (EDVA 1976) 416 F.Supp. 1207 (App J1-J16). That entire opinion which was made a portion of the Administratrix's Motion for Judgment deals with her right and that of the other then plaintiffs to assert their causes of action under the LHWCA. Judge Winston's opinion from the Circuit Court of the City of Norfolk (App. D1-D27) at D3, specifically refers to the Administratrix's right to proceed under the LHWCA.

Curiously Respondent on page 4 of her Brief cites both the Motion for Judgment and the opinion granting the Administratrix's right to proceed under

the LHWCA. Petitioners' right to proceed under the LHWCA was expressly affirmed in Allied Towing Corp. v. Tatem, (4th Cir. 1978) 580 F.2d 702 (App I-1-I12). Patricia Ann Brown received LHWCA compensation from her father's death in 1975 until this matter was settled in 1980, a period in excess of 5 years.

Additionally, Paragraphs 3 and 8 of the Administratrix's Motion for Judgment against Allied, decedent's employer and the vessel owner, contain language, appropriate to an action brought under the LHWCA. Paragraph 3 (App F2) charges "negligence of the defendant acting as a shipowner" while Paragraph 8 (App F4) alleges the "vessel ATC 3060 guilty of non-excluded owner occasioned negligence which contributed to the explosion." This is the exact language of Griffith

v. Wheeling Pittsburgh Steel Corporation, 521 F.2d 31 (1975) cert. den. 423 U.S. 1054, which was relied on by both the District Court and Fourth Circuit in affirming that the Administratrix has "a cause of action in negligence against their employer in its capacity as owner of the ATC 3060" (App J7 and J8).

B. Respondent states that "the Virginia Supreme Court remanded the case to the trial court solely for the purpose of having the sum awarded Hoggard redistributed among the other three claimants, Kay Brown, Ronnie Brown and Patricia." In fact the Virginia Supreme Court remanded "the case for further proceedings not inconsistent with the views expressed in this opinion" (App A22) i.e. "Kay's cause of

action is cognizable only under Virginia law" (App A20).

II.

THE ADMINISTRATRIX AS PERSONAL REPRESENTATIVE OF THE DECEDENT IS THE PROPER PARTY CHARGED WITH MAINTAINING ALL ASPECTS OF THIS MARITIME WRONGFUL DEATH CLAIM.

While it is Petitioners' belief and intent that all persons named as Petitioners in the style are petitioning parties properly before the Court, the Petitioner Kay J. Brown, Administratrix as the personal representative of her deceased husband is the proper party charged with maintaining all aspects of this maritime wrongful death act claim.

In a third party wrongful death claim under Section 33 U.S.C., Section 905 LHWCA (App L1), the Act provides "an injured employee, or his legal

representative in case death results from the injury, may elect to claim compensation under the Act, or maintain an action at law or in admiralty for damages on account of such injury or death." (Emphasis added)

Under the general maritime law, this Court has directed that the Death on the High Seas Act, 46 U.S.C. 761, be the primary guide for the lower "courts as they refine the non-statutory death remedy." Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624.

The Jones Act, 46 U.S.C. 688, like DOSHA and LHWCA vests the wrongful death cause of action in the "personal representative of the decedent."

Cases interpreting these federal statutes and the general maritime law have uniformly held that "only the personal representative and not the

beneficiary has the right to sue." Ivy v. Security Barge Lines, Inc., 585 F.2d 732 (5th Cir. 1978); Futch v. Midland Enterprises, Inc., 471 F.2d 1195 (5th Cir. 1973); Green v. Ross, 338 F.Supp 365 (DC SD Fla. 1972) aff'd. 481 F.2d 102, cert. denied 414 U.S. 1068 (wherein a dependent stepchild was held to be a permissive beneficiary).

This Court has interpreted similar language in the Federal Employers Liability Act, 45 U.S.C. Section 51. In American Railroad Co. of Porto Rico v. Birch, 224 U.S. 547, the widow and son of a deceased railroad worker brought an action as sole beneficiaries and the lower court held that they should not be compelled to have an administrator appointed for purposes of suit. This Court reversed although a full jury trial had been held.

> "But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, 'in case of his death, . . . to his or her personal representative.' . . .([T]his distinction between the parties to sue and the parties to be benefited by the suit makes clear the purposes of Congress. To this purpose we must yield."
>
> At U.S. 557.

The term "personal representative" requires some designation by a court that the individual seeking to prosecute the wrongful death action is an administrator of the decedent's estate. Complaint of Cosmopolitan Ship Co., S.A., 453 F.Supp 265 (SDNY 1978). Congress intended that the "personal representative" receive his or her authority from a state. See Briggs v. Pennsylvania R. Co. (2d Cir. 1946) 153

F.2d 841, 84; The Pan Two, (DC MD 1939) 26 F.Supp. 990, 993.

Kay J. Brown is the court appointed personal representative and as such is the only person procedurally capable of bringing this action.

III.

SUPPLEMENTAL LAW

While Brown v. Brown was not expressly mentioned, Judge D. Dortch Warriner of the Eastern District of Virginia, in an opinion order dated March 29, 1984, refused to dismiss an action on the ground "that no maritime action for wrongful death in State waters based on negligence exists." Judge Warriner relying on Foremost Insurance Co. v. Richardson, 457 U.S.

F.2d 841, 84; The Pan Two, (DC MD 1939) 26 F.Supp. 990, 993.

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668 (1982) refused to follow that portion of Ford v. Wooten, 681 F.2d 712 (11th Cir. 1982) relied on by the Virginia Supreme Court and respondent herein.

Judge Warriner's opinion is set forth in full hereafter.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ROSEMARY McKENNEY STANDBRIDGE,
Individually, etc., et al.

v. CIVIL ACTION NO. 83-0609R

JOHN DALE TAYLOR, et al

OPINION

The Court has before it a number of motions in this consolidated action. They have been fully briefed.

The defendants' motion to dismiss the action on the ground that no maritime action for wrongful death in

State waters based on negligence exists, is DENIED.

Ford v. Wooten, 681 F.2d 712 (11th Cir. 1982) was decided barely a month after **Foremost Insurance Co. v. Richardson**, 457 U.S. 668 (1982). The author of **Ford** is, so far as I am concerned, a prime authority on any aspect of the law. As a matter of pure fact I doubt there is any more respectable authority but as a matter of law there are two: the Court of Appeals for the Fourth Circuit and the United States Supreme Court. Obviously, **Foremost** had not come into Judge Hoffman's hands at the time he wrote **Ford**. Would that it had.

It is in my hands and I must consider its effect upon the instant case. The opinion in **Foremost** does not say in explicit words that

defendants' motion in this case must be denied. Nor does it say that in a case such as this, the court should dismiss. But it is implicit in the opinion as a whole that suits for wrongful death or personal injuries involving purely pleasure craft on State territorial waters are cognizable in admiralty. I so hold.

The moving consideration for the Foremost decision is, in my opinion, "the need for uniform rules to govern conduct and liability...." 457 U.S. at 674. Its purpose would not be achieved if we proceeded in admiralty court but applied State negligence and wrongful death rules. Accordingly, I hold that admiralty rules will apply in all aspects of the trial including, but not being limited to, questions of comparative negligence, questions of the

availability of a jury, and questions of limitations on liability.

The specific question presented on the limitation of liability to the value of the boat owned by defendant Taylor and now transferred to the trustee is not properly before the Court. Accordingly, the Court makes no ruling thereon.

And it is so ORDERED.

/s/ D. Dortch Warriner
United States District Judge

Dated: 29 March 1984

In Virginia there now exists a direct and irreconcilable conflict between the Supreme Court of Virginia and the United States District Courts in the proper exercise of maritime and admiralty jurisdiction arising out of wrongful death on state territorial waters.

CONCLUSION

The respondent has failed to address the primary issues in this case. She has raised false or irrelevant collateral issues not material to the basic issued raised by the Petitioners. The Petitioners claim that under any and all theories of maritime wrongful death, whether the statutory LHWCA or under the general maritime laws of the United States, federal admiralty jurisdiction applies and must be followed.

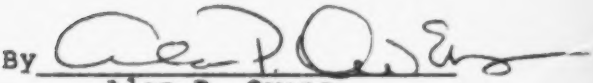
As stated by Justice Powell in his dissent in Foremost (supra) at 682:

> "State courts are duty bound to apply federal as well as local 'uniform rules of conduct.' See Testa v. Katt, 330 US 386, 91 L.Ed. 967, 67 S.Ct. 810 (1947). The Court does not suggest that state courts lack competency to apply federal as well as state law to this type of law traffic. And this Court stands ready, if necessary, to review state decisions to

ensure that important issues of federal law are resolved correctly."

Respectfully submitted,

KAY J. BROWN, ADMX., ETC.

By 
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CERTIFICATE OF SERVICE

I hereby certify that on or before June 6 , 1984, three copies of the foregoing Petitioners Reply Brief were mailed to S. Miles Dumville, Esquire, 310 South Boulevard, Post Office Box 14515, Richmond, Virginia 23221, Counsel for Patricia Ann Brown; and three copies of the foregoing Petitioners' Reply Brief were hand delivered to Wiley G. Gary, Esquire, 223 Monticello Arcade, Norfolk, Virginia, Guardian ad Litem for Ronnie Edward Brown.

I further certify that all parties required to be served have been served.

Alan P. Owens
Counsel for Petitioners